Filed 2/1/08

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SARAH B., Plaintiff and Respondent, v. FLOYD B. Defendant and Appellant.	D050080 (Super. Ct. No. D495543)

APPEAL from an order of the Superior Court of San Diego County, David Oberholtzer, Judge. Affirmed.

Floyd Brown, in pro. per., and Bonnie M. Simonek for Defendant and Appellant.

[*Retained.*]

Basie & Fritz and Erika Collins for Plaintiff and Respondent.

---

1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III.A, C, D and E.

I.

INTRODUCTION

Appellant Floyd B. appeals from a final order regarding custody of his daughter N.B.[2] Sarah B. and Floyd B. were dating when Sarah became pregnant with N.B. Floyd and Sarah lived together, but never married. When N.B. was approximately one and a half years old, Sarah decided to leave Floyd and move to Colorado with N.B. A month after Sarah and N.B. arrived in Colorado, Sarah filed a petition in the trial court to establish that Floyd was N.B.'s father, and requested that the court determine custody and visitation, and appropriate child support.

After reviewing the report of the court-appointed evaluator and hearing testimony from the parties, the trial court concluded that because N.B. had a more mature and stable relationship with her mother, it would be in N.B.'s best interest to grant Sarah primary physical custody, even though Sarah resided in Colorado.

---

2 Although the record on appeal contains no formal judgment and there appears to be no formal order by the court, we exercise our discretion to treat the court's written and signed memorandum of findings after the October 12, 2006 hearing as an appealable final order. "[I]t is well settled that the substance or effect of the judgment and not its designation is determinative of its finality. A memorandum of decision may be treated as an appealable order or judgment when it is signed and filed, and when it constitutes the trial judge's determination on the merits. [Citations.]" (*Estate of Lock* (1981) 122 Cal.App.3d 892, 896.) Here, the court identified a specific shared parenting plan and calculated an award of child support, there is no indication that an additional order or judgment was ever filed, and neither party has raised the issue of the appealability of the court's determination. We therefore conclude that the trial court's memorandum of findings constitutes the court's final determination of this matter on the merits and should be treated as a final appealable order.

On appeal, Floyd raises a variety of legal and factual challenges to the trial court's actions in this case. Floyd asserts that the trial court erred when it did not find Sarah in violation of the standard temporary restraining order (TRO) issued in conjunction with Sarah's petition to establish a parental relationship on the ground that she moved with N.B. to Colorado. Floyd also contends that it was error for the court to adopt the reports of the family court mediator and the child custody evaluator. Floyd further asserts that the trial court failed to apply the appropriate standard for a move-away case. In addition, Floyd raises a number of other contentions, in which he essentially re-argues the facts of this case and claims that it was inappropriate for Sarah to move to Colorado, and that he cannot have a meaningful relationship with N.B. if Sarah is permitted to retain primary physical custody of N.B. in Colorado.

Floyd also raises arguments in his reply brief that he did not raise in his opening brief. Floyd contends in his reply brief that the trial court made a number of procedural errors that deprived him of a fair hearing. Specifically, Floyd asserts that the trial court never required Sarah to request a move away order; that the court prevented Floyd from presenting his entire case by insisting on concluding the hearing before 4:00 p.m. on the day of the hearing, and that the court failed to define the purpose and scope of the evaluation the court ordered pursuant to Evidence Code section 703.

We conclude that none of the arguments Floyd raises presents a sufficient ground for reversing the trial court's order. Although Floyd takes issue with the evidence presented and the trial court's interpretation of that evidence, he has not shown that the

trial court committed legal error or that the court abused its discretion in setting out a custody plan for N.B. We therefore affirm the trial court's custody order.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

Sarah and Floyd dated briefly in 1994. Although the two lost touch, they became reacquainted and began dating again in August 2003. At the time, Sarah was in the Air Force and was living in San Antonio, Texas. Floyd was living in San Diego. In October 2003, the couple learned that Sarah was pregnant. They decided that Sarah would leave the Air Force and move to San Diego, and that they would work on their relationship. N.B. was born in July 2004.

In December 2004, Sarah accepted employment with the Air Force Reserves. The following month, Sarah and N.B. moved to Los Angeles for a six-month active duty tour. In May 2005, Sarah received an offer to take a six-month active duty tour in Colorado Springs. She agreed to take the job after Floyd indicated that would be fine with him. However, the job fell through and Sarah returned to San Diego in June 2005. Sarah started a new job on July 5, 2006. She received benefits and health insurance for N.B. through her employer.

Arguments between Sarah and Floyd began to escalate during this time. Floyd refused to continue to attend counseling sessions with Sarah. In November 2005, Sarah and Floyd decided that they would work on their relationship for three more months, but that if the relationship did not improve, they would part ways.

In February 2006, Sarah decided to leave Floyd. While Floyd was out of town, Sarah drove with N.B. to Sarah's sister's home in Colorado. Although Sarah and Floyd had been planning to separate, the parties dispute whether Sarah told Floyd that she intended to move out of the state.

B. *Procedural background*

Sarah filed a "Petition to Establish Parental Relationship" in the San Diego County Superior Court on March 7, 2006. The parties participated in a mediation conference on March 27, but were unable to reach an agreement as to a custody sharing plan. The mediator recommended in her report that N.B. reside primarily with Sarah. The court entered a judgment of paternity establishing Floyd as N.B.'s father on May 8, 2006.[3] The trial court also entered temporary custody orders in which the court allowed N.B. to remain in Colorado with Sarah, and granted Floyd visitation.

The trial court delayed making an initial custody determination pending the completion of an evaluation report by Neil. G. Ribner, Ph.D. On October 26, 2006, after receiving Dr. Ribner's report and hearing testimony from Sarah, Floyd, and a friend of Floyd's, the court issued its findings with regard to an initial custody determination. The trial court granted Floyd and Sarah shared legal custody of N.B., and granted Sarah primary physical custody. The court also adopted a detailed visitation schedule. The schedule provides, among other things, that Floyd be permitted visitation with N.B. the

---

[3] Because the appellant's appendix filed as the record in this case does not contain a number of documents that were filed in the trial court, we rely in part on the trial court's description of the procedural history of the case.

first weekend of each month in San Diego, and the third weekend of each month in Colorado. The schedule also details how holidays, birthdays and vacations with N.B. are to be divided between Sarah and Floyd. Both parents are required to attend counseling, enroll in a parenting class, and refrain from making disparaging comments about each other in N.B.'s presence.

Floyd appealed from the trial court's order on December 22, 2006.

III.

DISCUSSION

A. *Standard of review*

Custody and visitation orders are reviewed for an abuse of discretion. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) "The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. [Citation.]" (*Burgess, supra*, 13 Cal. 4th at p. 32.)

B. *The TRO does not provide a basis for reversing the trial court's order*

Floyd argues that by removing N.B. from California, Sarah violated the standard TRO that is issued upon the filing of a petition to establish a parental relationship. The TRO prohibits any party from removing the child from the state without the consent of the other party or a court order. Floyd contends that early in the process, when the court heard Sarah's OSC and issued a temporary custody order, the trial court should have

required that Sarah return N.B. to California rather than allowing her to remain in Colorado with N.B.

Sarah filed the petition to establish Floyd as N.B.'s father pursuant to the Uniform Parentage Act, Family Code[4] section 7600, et seq. Section 7700 provides that when a petition is filed under this section, "In addition to the contents required by Section 412.20 of the Code of Civil Procedure, in a proceeding under this part the summons shall contain a temporary restraining order restraining all parties, without prior written consent of the other party or an order of the court, from removing from the state any minor child for whom the proceeding seeks to establish a parent and child relationship." Floyd contends that the court's failure to order that N.B. be returned to California pursuant to the restraining order constitutes error. We disagree.

As the trial court pointed out, the statute does not state that a child who is already residing in another state at the time the petition is filed must be returned to California. Rather, the provision states only that a parent may not remove the child from the state, absent written permission from the other party or an order of the court, once the petition has been filed. N.B. was not in California at the time the petition was filed, and there is no indication that Sarah unlawfully removed N.B. from California. There was no court order in effect in February 2006 when Sarah moved with N.B. to Colorado, since neither party had petitioned the court for an order determining custody at that time.

---

4 Further statutory references are to the Family Code unless otherwise indicated.

Floyd admits that there was no court order in place before Sarah moved to Colorado. He states in his opening brief, "Prior to February 10, 2006, there were no custody orders in place. In fact, neither [Floyd] nor [Sarah] had ever been before this court on any issue and [as] such, the custody was truly joint custody . . . ." There was thus no legal impediment to Sarah changing N.B.'s residence.[5]

Floyd has cited no authority that suggests that a parent who is residing in another state with a child at the time he or she seeks the assistance of a California family court must return the child to California. In fact, the Legislature has acknowledged that there may be times when California courts determine custody issues that involve children who are not residing in the state. Specifically, under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), California courts may make custody determinations in certain circumstances, even though the child at issue may not reside in California.[6] "[A] court of this state has jurisdiction to make an initial child custody determination" if California "is the home state of the child on the date of the commencement of the proceeding, *or was the home state of the child within six months before the*

---

5 In the absence of a court order or decree affecting custody, both a mother and a father have an equal right to custody of an unmarried minor child. (§§ 3010, 7500.) "Although [the Penal Code] makes it a crime maliciously to take, entice away, detain, or conceal a child from the person having lawful charge of the child, the California Supreme Court has made clear that in the absence of an order or decree affecting custody, a parent does not commit child stealing by taking exclusive possession of the child. [Citation.]" (*Cline v. Superior Court* (1982) 135 Cal.App.3d 943, 947.)

6 A number of states, including California, have adopted the UCCJEA, which sets forth the circumstances under which a state may exercise its authority to make custody determinations.

commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state." (§ 3421, subd. (1), italics added.)[7] There is no reason to believe that the Legislature intended that children living elsewhere be returned to California anytime a custody proceeding has been initiated in California.

Floyd points out that Sarah stated in her petition that N.B. could be found within California, and that this constitutes proof that Sarah unlawfully removed N.B. from the state *after* she filed the petition. On the first page of the petition, under the statement, "4. The action is brought in this county because (you must check one or more to file in this county)," Sarah marked with an "x" the statement, "the child resides or is found in the county." However, Sarah's attorney explained at a hearing that the attorney marked the box indicating that N.B. could be found in the county, and that she did so because there was no other appropriate option on the form.[8]

---

[7] "Home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." (§ 3402, subd. (g).) A "child custody determination" is a "judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order." (*Id*., subd. (c).) A proceeding to establish paternity is considered a "child custody proceeding" for purposes of application of the UCCJEA. (See § 3402, subd. (d).)

[8] This question on the judicial form for petitions to establish a parental relationship appears to relate to the issue of an appropriate venue for the action. As we have already discussed, the court clearly has jurisdiction to make a custody determination in certain circumstances, even if the child is not in the state. However, section 7620 provides for personal jurisdiction and venue in actions to establish a parental relationship. California courts have personal jurisdiction over "[a] person who has sexual intercourse or causes

The supporting declaration filed with the petition clearly states that N.B.'s residence at the time the petition was filed was in Colorado, not California, thereby indicating that N.B. was not to be found in California. This constitutes sufficient evidence to support the trial court's conclusion that N.B. was residing outside of California at the time the petition was filed. There is also sufficient evidence to support the court's conclusion that despite N.B.'s status as a new resident of Colorado, California could still be considered her home state for purposes of determining custody.[9] Because the court determined that Sarah and N.B. were residing in Colorado at the time Sarah filed her petition, any court orders in this case were made after N.B. was already living in Colorado.

---

conception with the intent to become a legal parent by assisted reproduction . . . ." (*Ibid.*) Additionally, "[a]n action under this part shall be brought in one of the following: [¶] (1) The county in which the child resides or is found. [¶] (2) The county in which a licensed California adoption agency maintains an office if that agency brings the action. [¶] (3) If the father is deceased, the county in which proceedings for probate of the estate of the father of the child have been or could be commenced." (§ 7620, subds. (a), (b).) Thus, the venue provision does not appear to contemplate a situation like the one here, in which a parent moves to another state with the child prior to filing the petition. However, Floyd did not raise a challenge to the proceedings based on venue.

9 At the hearing on Sarah's OSC, the court and the attorneys discussed the fact that Sarah had been unable to file a petition to establish Floyd's paternity in Colorado because Colorado courts would not exercise jurisdiction over a custody determination as to N.B. since she had not been a resident of Colorado for a long enough period of time under the UCCJEA. Sarah therefore filed her petition in a California court. This was reasonable, given the fact that California courts have personal jurisdiction over Floyd, and N.B. had significant ties to California and had been living there within the six months before Sarah commenced these proceedings.

Even if one were to interpret the provisions of section 7700 as creating a presumption that a parent must return a nonresident child to California upon filing a petition to establish a parental relationship, and that the failure to do so would constitute a violation of the automatic TRO, the trial court's first concern is the child's best interest. If the trial court has the power to permit a party to remove a child from the state after a petition has been filed, as section 7700 clearly authorizes, the court must have the authority to determine, as the court did here, that a child who has previously been removed from the state need not be returned to California if doing so would not be in that child's best interest. The trial court clearly believed that in the circumstances of this case, an order permitting N.B. to remain in Colorado was warranted. The court did not abuse its discretion in making this determination.

Although Floyd expresses frustration with the manner in which Sarah has handled this matter, he has provided no grounds for this court to conclude that the trial court erred in allowing Sarah to maintain N.B.'s residence in Colorado while the petition was pending.

C. *The trial court did not err in its custody determination*

Floyd asserts that the trial court erred in permitting Sarah to retain primary physical custody of N.B. in Colorado. Floyd contends that the trial court did not apply the appropriate "move away" standard for determining custody. He further challenges the trial court's discretionary decision, re-arguing the state of the evidence, challenging Sarah's credibility, and challenging the court's reliance on the reports of the mediator and the court-appointed evaluator. In essence, Floyd asserts that the trial court should have

awarded him primary physical custody of N.B. We conclude that Floyd's arguments are without merit. The trial court applied the appropriate standard and did not abuse its discretion in adopting the parenting plan at issue.

1. *The trial court applied the appropriate standard*

Floyd argues that the trial court failed to apply "the move away standards set forth in *Burgess* and *LaMusga*." He claims that the trial court failed to consider "the relevant factors of a move-away case," including N.B.'s interest in stability and continuity, the distance of the move, N.B.'s age, N.B.'s relationship with both parents, the relationship between the parents, the reason for the proposed move, and the extent to which the parents currently share custody of the child.

Contrary to Floyd's contention, the trial court applied the correct standard in deciding the custody issue. There was no permanent judicial custody determination in place at the time of the hearing.[10] This matter was thus in the trial court for an initial permanent custody order. The Supreme Court has held that where there has been no permanent judicial custody determination, the trial court must, in its discretion, devise a parenting plan that is in the child's best interest. (*Burgess, supra*, 13 Cal.4th at pp. 31-32.) In *Burgess*, the parties had stipulated to a temporary custody arrangement, but there

---

10 Although Sarah was living in a different state at the time the court decided the custody issue, there had been no prior permanent judicial custody determination. Thus, Sarah was not coming to the court seeking to change a final custody order to allow her to move to Colorado. This fact distinguishes this case from the "move away" cases that Floyd insists should apply here.

had been no permanent judicial custody determination prior to the order under review in that case. (*Ibid*.) The same is true here.

"In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan that is in the best interest of the child.' [Citation] It must look to *all the circumstances* bearing on the best interest of the minor child. [Citation.]" (*Burgess, supra*, 13 Cal.4th at p. 31.) "Family Code section 3011 lists specific factors, 'among others,' that the trial court must consider in determining the 'best interest' of the child in a proceeding to determine custody and visitation: '(a) The health, safety, and welfare of the child. [¶] (b) Any history of abuse by one parent against the child or against the other parent. . . . [¶] (c) The nature and amount of contact with both parents.'" (*Id*. at p. 32.)

"In addition, in a matter involving immediate or eventual relocation by one or both parents, the trial court must take into account the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare. (Fam. Code, § 7501 ['A parent entitled to custody of the child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.'].) Accordingly, in considering all of the circumstances affecting the 'best interest' of minor children, it may consider any effects of such relocation on their rights or welfare." (*Burgess, supra*, 13 Cal.4th at p. 32.)

The trial court applied the best interest test identified in *Burgess*. At the hearing, the court stated, "[T]his was joint physical custody at the time [Sarah] moved, and neither

side needs to prove detriment. The determination will be made based on the best interest of the child."

In addition, the record demonstrates that the trial court did, in fact, consider all of the factors Floyd identifies in determining what custody arrangement would be in N.B.'s best interests. The court was acutely aware of the fact that this custody decision involved parents who were living in different states. The court stated, "In this instance, we have a mother who's living in Colorado, and we have a father who's living in San Diego, and it is up to me to determine, at least initially, might be up to three people up on B Street later, but it's up to me now, to determine what would be in [N.B.]'s best interest between the two. [¶] I have an unhappy choice because, as Dr. Ribner said, it would be in [N.B.]'s best interest to have her parents living near each other. I don't have that choice."

Thus, even though this was not a typical "move away" case, the court recognized that the main issue to be determined at the hearing was what would be best for N.B. given Sarah's decision to move to Colorado. This included consideration of how any particular custody decision might affect N.B.'s relationship with the parent who was not awarded primary physical custody. For example, when Floyd's attorney raised the concern that allowing Sarah to have primary physical custody of N.B. would limit Floyd's ability to be a part of the everyday aspects of N.B.'s life, the trial court responded, "That is the same – that is the situation we face with every single move-away. In this state the Legislature determines that a parent has presumptively the right to move away." The court also acknowledged that one factor it was to consider was which parent would be "more likely to maintain and sustain and actually encourage a relationship with the other parent."

There is no merit to Floyd's contention that the court failed to apply the appropriate test in making its initial custody determination.

2. *The trial court did not abuse its discretion in granting Sarah primary physical custody of N.B.*

Floyd challenges the evidence and the trial court's interpretation of the evidence, and as well as the trial court's ultimate determination that awarding Sarah primary physical custody would be in N.B.'s best interest. We find no abuse of discretion. After hearing testimony from both parents and considering Dr. Ribner's evaluation, the trial court reasonably concluded that it would be in N.B.'s best interest to order that Floyd and Sarah retain joint legal custody, with Sarah retaining primary physical custody, despite the fact that Sarah was living in Colorado.

In making its decision, the trial court focused on the strong bond between N.B. and her mother:

> "Dr. Ribner concluded both [Floyd] and [Sarah] were competent, caring parents, but the mother had the more stable and mature bond with the child. From [Floyd's] psychological testing, Dr. Ribner concluded he had a limited frustration tolerance and might react to the rearing of a young girl by focusing more on how the emotional pressures are causing him some discomfort rather than empathizing with the child's distress. In the court's view, these projections are something to keep in mind if [Floyd] and [Sarah] are unable to co-parent without undue conflict, but are of limited value now, given the undisputed strong bond between [N.B.] and her father. [¶] Nevertheless, Dr. Ribner's conclusion that Sarah has a more mature and stable bond with [N.B.] is compelling evidence in favor of awarding the mother physical custody. The FCS [Family Court Services] mediator reached the same conclusion, based on her finding the mother was the primary caregiver to [N.B.] While the court believes [Sarah] has deliberately understated [Floyd's] involvement in the child's care and support, the fact that [N.B.]

> remained with [Sarah] during her active duty in Los Angeles indicates [Floyd] views the mother as the primary caretaker as well."

There is substantial evidence to support the trial court's decision. For example, Dr. Ribner stated, "In the observation sessions, although the minor was clearly comfortable with both parents, there was an ease of interchange and a familiarity with her mother that was not as apparent as with her father. It thus seems that it would be more detrimental to remove [N.B.] from her mother's care than remain separated from her father." Dr. Ribner further concluded that it would be "in [N.B.]'s best interests to have ongoing and frequent contact with both parents. Although such frequency will be limited due to geographical distance, [N.B.]'s best interests will be served by remaining in her mother's primary care. Looking beyond the toddler years, the test data suggest that living in her father's primary care would be more problematic for the young girl than would remaining with her mother." The court also noted that "two independent third parties have looked at this, and one of them in April, right close to the time of the move, and [came] to the same conclusion," which the court ultimately shared, "that the primary bond and the primary caretaker for [N.B.] is with her mother."

Floyd takes issue with the trial court's reliance on evidence Sarah presented and on the reports of the mediator and the evaluator. Specifically, Floyd challenges the veracity of Sarah's testimony, contending that she lied about a number of things, and argues that the court's reliance on the mediator's and the evaluator's reports was error, since they relied on misleading information that Sarah provided. However, the record demonstrates

that the trial court very carefully considered both the credibility of the parties' statements as well as the weight to be given to third party reports.

When Floyd's attorney suggested that the reports were biased because Sarah had lied about what happened between her and Floyd, the trial court rejected the argument, stating, "You're wrong about the FCS reports. They tell me what each of the parties is contending, and they tell me in the reasons for recommendation what they found important. So just because it's there doesn't mean that it is appropriate." The court also pointed out that the evaluators acknowledged that the parties gave very different versions of relevant events: "I'm going through this, especially the FCS mediation and, for example, she says: 'It is impossible to know if the mother or father is more accurate regarding what was said and what had been agreed to prior to the move.' That's a toss-up. She doesn't know who's telling the truth. [¶] . . . [¶] And in Dr. Ribner's report, he listened to both sides very carefully and documented what each side had to say, so . . . ." Further, the court noted that both reports reached similar conclusions, and neither report concluded that Floyd should have little or no relationship with N.B. Rather, focusing on N.B.'s interests, the court noted that the FCS mediator "believes the child and the father have a close relationship, and that the child would have ─ the child would benefit from having frequent contact with the father. So that's what she relied on in reaching her conclusions." The court did not believe that the evaluators had been so misled by Sarah that their reports could not be trusted.

Further, the trial court clearly found Sarah to be sufficiently credible, despite evidence that Sarah was not completely truthful during the proceedings.[11] The record also suggests that the trial court questioned both parties' veracity. There is no basis for this court to second guess the trial court's factual and credibility determinations. (See *In re Marriage of Martin* (1991) 229 Cal.App.3d 1196, 1200 ["'our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge . . . the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom'"].)

Floyd also suggests that the trial court did not do its own analysis, but rather, simply "rubber stamped" the recommendations of others. The record belies this contention. The trial court clearly considered a number of factors—including the testimony of both parents at the hearing—and independently concluded that Dr. Ribner's report was useful and provided a reasonable plan for the sharing of legal and physical custody of N.B. Floyd has not established that the trial court abused its discretion in determining that it would be in N.B.'s best interests for her mother to be awarded primary physical custody.

---

11 In the trial court's written findings, the court noted Floyd's assertion that Sarah had misled the FCS mediator on several points. The court also acknowledged that Sarah had "colored events to her own advantage" and that at times, she "simply lied about Sarah's involvement with [N.B.]" However, the court found that the mediator had not relied on any of Sarah's misleading statements in reaching her recommendation.

D. *Floyd has forfeited the arguments he raises for the first time in his reply brief*

In his reply brief, Floyd raises for the first time the argument that the trial court made multiple procedural errors which, Floyd contends, deprived him of a fair hearing. For example, Floyd asserts that the trial court ruled that Sarah should be permitted to keep N.B. with her in Colorado without having requested a move away order, denied Floyd's request for a full day hearing, thereby preventing Floyd from presenting his entire case, and failed to issue an order defining the purpose and scope of the evaluation that was completed pursuant to Evidence Code section 703.

Floyd has forfeited any arguments that he failed to raise in his opening brief, and we therefore decline to fully consider them. (See e.g., *Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 318, fn. 1 ["An appellant . . . abandons an issue by failing to raise it in his or her opening brief"]; *H.N. & Frances C. Berger Foundation v. City of Escondido* (2005) 127 Cal.App.4th 1, 15 ["appellant abandons an issue by failing to raise it in the opening brief"]; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [arguments not raised in opening brief are waived]; *Cal. Rec. Indus. v. Kierstead* (1988) 199 Cal.App.3d 203, 205, fn. 1 [defendants abandoned argument by failing to raise it in their opening brief]; *Brenkwitz v. Santa Cruz* (1969) 272 Cal.App.2d 812, 819 ["The point was not made in their opening brief and therefore we shall disregard it"].)

In any event, the arguments Floyd raises in his reply brief lack merit, or fail for other reasons. As we have explained, contrary to Floyd's assertion that the trial court erred in allowing N.B. to remain with Sarah in Colorado because Sarah never requested a move away order, there was no need for Sarah to request a move away order because she

was already living in Colorado at the time the court made its initial temporary custody order. There is sufficient evidence in the record to support the trial court's finding that Sarah and N.B. were residing in Colorado at the time the court made both its temporary and final custody determinations.

Floyd has offered no authority to support his contention that the trial court erred by ending the evidentiary hearing at 4:00 p.m. on the same day the hearing started. The record does not demonstrate that Floyd was in any way disadvantaged by the trial court's limiting the time spent hearing testimonial evidence; it is clear that the trial court was aware of the inconsistencies in Sarah's prior statements and considered her credibility in light of that knowledge. In addition, the transcript demonstrates that Floyd's counsel was given sufficient time to present Floyd's case and that counsel finished well within the court's time frame.

Finally, the record Floyd has supplied to this court does not indicate whether the trial court adequately defined the purpose and scope of Dr. Ribner's evaluation. The transcript of the hearing at which the trial court decided to refer the family to Dr. Ribner for an evaluation reflects that a written order was to be prepared after the hearing. However, the appellant's appendix Floyd filed in this appeal does not include a written order that corresponds with the relevant hearing. The record is thus insufficient for this court to consider on the merits Floyd's contention that the trial court failed to adequately identify the purpose and scope of Dr. Ribner's evaluation.

E. *The parties' motions*

1. *Sarah's motion to strike*

Sarah has filed a motion to strike Floyd's reply brief. Sarah notes that Floyd fails to cite to the record in his reply brief, and that he presents issues he failed to raise in his opening brief. Sarah further challenges Floyd's reply brief on the ground that it contains references to a deposition transcript that, at the time the reply brief was filed, was not included in the record. Because we decline to consider that portion of Floyd's reply brief in which he raises arguments for the first time, we need not strike the brief on this ground. Further, we are partially granting Floyd's request to augment the record with the deposition transcript to which Floyd cites in his brief, so we need not strike the brief on this ground, either. Finally, although Sarah has identified a number of deficiencies in Floyd's reply brief, we nevertheless exercise our discretion under California Rules of Court, rule 8.204(e)(2)(C) to disregard Floyd's noncompliance. (See *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 343 [noting court's discretion to disregard noncompliance under former California Rules of Court, rule 14(e)(2)(C)].)

2. *Floyd's motion to augment*

Floyd moves to augment the record with three items: (1) the transcript of the June 3, 2006 deposition of Sarah; (2) a copy of the "Petition to Establish a Parental Relationship;" and (3) a copy of a civil complaint filed by Sarah against Floyd. We grant the request as to the first and third items. There is no need to augment the record with a copy of Sarah's petition, because the petition is contained in the Appellant's Appendix.

IV.

DISPOSITION

The order of the trial court is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.